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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 682

JOHN I. COOPER, H. W. PRICE, L. W. PRICE, JUNE PRICE DANGLADE, DORIS LEE TAMMANY, CLARA MAY EDWARDS, JOHN M. GREEN and TRUE W. CHILDS TRUST, H. W. PRICE, Trustee and L. W. PRICE, Successor Trustee to John I. Cooper, Deceased Trustee, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

JOHN I. COOPER, H. W. PRICE, L. W. PRICE, JUNE PRICE DANGLADE, DORIS LEE TAMMANY, CLARA MAY EDWARDS, JOHN M. GREEN, and TRUE W. CHILDS TRUST, H. W. PRICE, Trustee and L. W. PRICE, Successor Trustee to John I. Cooper, Deceased Trustee, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on November 28, 1958.

OPINIONS BELOW.

The decision of the Tax Court of the United States is not officially reported but copy thereof appears in the record at pages 46-56.

The opinion of the United States Court of Appeals for the Tenth Circuit is not reported either officially or unofficially at this time.

JURISDICTION.

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on November 28, 1958, copy thereof is appended to this petition in the appendix at pages A1 to A10. Petition for Rehearing was denied on December 29, 1958, and petitioner's motion for stay of mandate was granted on January 8, 1959, for a period of thirty days thereafter in which to file this petition for a writ of certiorari.

The jurisdiction of this Court is invoked under *28 U.S.C., Section 1254 (1)*.

QUESTIONS PRESENTED AND SPECIFICATION OF ERROR.

Petitioner, an *inter vivos* trust, filed fiduciary income tax returns for the years 1950 to 1953, inclusive. The Commissioner determined deficiencies on the ground that the petitioner trust was an "association" and therefore taxable as a corporation under *Section 3797 (a) (3) of the Internal Revenue Code of 1939*. The Tax Court sustained the determination of the Commissioner (See opinion, record 46-56) which decision was affirmed by the United

States Court of Appeals for the Tenth Circuit (opinion at appendix herein, pages A1 to A10).

The basic question presented is whether or not the Circuit Court of Appeals erred in its judgment and decision that petitioner trust was an "association" taxable as a corporation under 3797 (a) (3). Also presented are the underlying questions:

(a) Was the intent of the Congress of the United States in enactment of *Section 3797 (a) (1)* and *(3)* to tax as a corporation a family trust such as petitioner trust here?

(b) Is the decision of the Court of Appeals a misapplication of the principles established by this Court in *Morrissey* v. *Commissioner*, 296 U. S. 344?

(c) Is the decision of the Court of Appeals in conflict with governing principles recognized and applied by other courts of appeal?

(d) Is a federal question decided by the court below in a way probably in conflict with applicable principles of decisions of this Court?

(e) Is the decision below in error generally in affirming the opinion of the Tax Court of the United States?

Petitioner respectfully urges that the Court of Appeals erred in its decision that petitioner was taxable as a corporation and for specification of errors submits that the decision is:

(i) A misapplication of the principles of *Morrissey, supra,*

(ii) In conflict with governing principles applied by other Courts of Appeal

(iii) Probably in conflict with applicable principles of decisions of this court

(iv) Generally contrary to law.

STATUTES AND REGULATIONS INVOLVED.

The statute involved here is *Section 3797 (a)(1)(3) Internal Revenue Code of 1939* as amended (U.S.C.)

The regulations here involved are *Regulations 111, Sections 29.3779-1, 29.3797-2* and *29.3797-3* as to the taxable years 1950 and 1951 and *Regulations 118, Sections 39.3797-1, 39.3797-2*, and *39.3797-3* are applicable to the taxable years 1952 and 1953.

STATEMENT.

The John M. Cooper trust, a testamentary trust, was created in 1914 by the will of John M. Cooper, ancestor of the beneficiaries of the petitioner trust, which testamentary trust corpus included all of the testator's residuary estate and was for a term of thirty-five years, at the end of which it was to be distributed in equal shares to the then living of the testator's children and the heirs of his deceased children. On October 19, 1949, the end of the thirty five year term, the then remaining assets of the testamentary trust having an aggregate value of $355,323.00 (R. 75) were distributed and consisted of 14 parcels of real estate in Anderson and Cherokee Counties, Kansas and Ottawa County, Oklahoma, and 315 shares, constituting a controlling interest, capital stock of the Baxter State Bank were distributed in kind and at the same time a cash distribution of the entire balance of the trust assets, cash and pro-

ceeds of conversion into cash of other assets and in the amount of $198,081.00 was made to the beneficiaries of the testamentary trust (R. 75). The real estate and bank stock were distributed in kind and simultaneously the instrument created in the taxpayer trust (R. 18-25) was executed on October 19, 1949, by the beneficiaries of the testamentary trust and their spouses and conveyed to two of the beneficiaries, John I. Cooper and H. W. Price, as Trustees, all of the assets of the testamentary trust except the cash and proceeds of conversion of Series G bonds.

This is a strict trust formed for the sole purpose of conservation, preservation and orderly liquidation of inherited property and receipt and distribution of income from that property during the period required for most advantageous liquidation of the inherited property. The trust was created simultaneous with the liquidation and distribution, partly in kind, of a predecessor testamentary trust and was created by the beneficiary distributees of the predecessor trust who were the then living heirs of a common ancestor who had created the original testamentary trust. The trust instrument specifically provided that the trust assets were to be held:

> "* * * until such time as the trustees * * * may sell and convert into cash * * * for distribution among the grantors herein, their heirs and assigns * * *"

the trustees to hold and manage the trust assets:

> "* * * so that maximum return may be received therefrom either from rents or royalties, or from the sale (of the trust corpus) * * * until the liquidation and distribution of said trust property has been completed as herein contemplated."

The trust instrument further unequivocally recites that:

> "The main purpose of this trust is to provide for an economical and centralized management and operation of the property of this trust, until the liquidation and distribution of said trust property has been completed as herein contemplated".

and reiterating the positive objective of liquidation, the trust instrument further provided:

> "* * * in the event liquidation and distribution has not been made of all of the corpus of said trust at the end of said ten year period (the beneficiaries), to have and receive from said trustees upon the expiration of the fixed term hereof, their proportionate part and share of such remaining assets and property of the trust, either in kind or in cash."

This is a family trust, is not a device formed as an enterprise for the transaction of business with a contribution of risk capital to the venture, and is not an association taxable as a corporation. The only business transacted by the trustees of petitioner was the collection of farm rentals, mining royalties, bank stock dividends, and the sales of small blocks of shares of bank stock and sale of two parcels of real estate (R. 65-69 and 41, 43, 45 and 46), and such incidental transactions as maintaining fire insurance, payment of state and federal taxes, payment of upkeep on farm improvements, etc. Distributions were made by the trustees in the amounts of $57,000.00, $72,000.00, $48,000.00 and $48,000.00 in the years 1950, 1951, 1952 and 1953 respectively in total amount of $225,000.00 (R. 32) which constituted 93% of the amount available for distribution and 88.5% of the total trust income for the four year period (R. 32 and 33). Except for these distributions to the beneficiaries, no other disbursements were made except for taxes, insurance, repairs and trustees' salaries (R. 41, 43,

45 and 46). No investment of trust funds was made at any time (R. 68) and no assets were purchased (R. 68). At the time of the creation of the trust, the real estate had no known market value and could not then be sold for a fraction of its potential mineral royalty recovery (R. 68-69). The only other asset making up the corpus of petitioner trust was the bank stock which then had a rapidly appreciating value and represented control of the bank (R. 65).

The Commissioner of Internal Revenue determined deficiencies in income tax of the petitioner trust for the years 1950 through 1953 on the ground that it was an "association" taxable as a corporation under *Internal Revenue Code Section 3797 (a) (3) of 1939* and not a trust taxable as an individual under *Internal Revenue Code Section 3797 (a) (1) of 1939*. The Tax Court of the United States, on taxpayer's petition for redetermination, upheld the determination of the Commissioner, the gist of that decision being that the petitioner trust did not intend and provide for an "immediate liquidation as soon as circumstances will permit", although recognizing the doctrine as announced by this Court in *Morrissey v. Commissioner, supra*, and three companion cases decided by this Court on the same date, that a trust formed for liquidating purposes is not formed for the purpose of carrying on a business (R. 53).

On petition to review, the Court of Appeals affirmed the opinion, appendix, pages A1 to A10, without dealing with the multitude of decisions of this Court and inferior federal courts announcing and applying the long recognized rule that the "business test" is the principal determinant in deciding taxable status as a pure trust or as a corporation (*Lewis & Company v. Commissioner*, 301 U. S. 385) and summarily dismissed consideration of the familiar fam-

ily trust cases (*Guitar Trust Estate* v. *Commissioner*, Cir. 5, 72 F. 2d 544; *Blair* v. *Wilson Syndicate Trust*, Cir. 5, 39 F. 2d 43; *Fisk* v. *United States*, (D. C. Mass.) 60 F. 2d 665; *Commissioner* v. *Morris Realty Company Trust*, Cir. 7, 68 F. 2d 648; *Magoon Trust Estate*, 42 B. T. A. 1043), with the statement that "important factual differences clearly distinguish the instant cases from the family trust cases * * * without pointing out any basis of such distinction."

Basically the decision of the Court of Appeals is a mechanical application of the rule of *Morrissey* v. *Commissioner*, *supra*, which was entirely unwarranted.

REASONS FOR GRANTING THE WRIT.

I.

To Eliminate Confusion in Lower Courts' Application of the Principles of Morrissey v. Commisisoner, supra.

It is urgent that the writ be granted since the matter involved is of wide import under the Internal Revenue Code, the question being of immediate importance far beyond the particular facts and the parties here involved, and, since this is a tax case, the issue is one of continuing and constant importance; widespread litigation will continue until the point is settled or clarified by this Court as is demonstrated by the fact that the decision in *Morrissey* v. *Commissioner*, *supra*, has been cited in some three-hundred-twenty-five or thirty cases, in over fifty of which it has been distinguished, explained or cited as authority in dissenting opinions.

The Morrissey decision is ripe for re-examination and delineation of limitations of its application so that it not

continue to be erroneously applied as an universal rule of thumb for the solution of all trust versus association cases solely on the basis of the existence of the five indicia of "resemblance" and in disregard of other and more decisive determinants.

The need of granting the writ in this case is critical in that the whole area of the law of tax status of *inter vivos* and testamentary trusts and the field of estate planning is in a state of chaotic confusion as the result of the promiscuous misapplication by lower courts on the decision of this Court in *Morrissey* v. *Commissioner*, *supra*. The decision below is clearly erroneous and adds to the conflict of decisions as to the distinction for tax purposes between an "association" and a "pure trust".

II.

Conflict with Other Courts of Appeal.

The decision below is in conflict with governing principles recognized and applied by other courts of appeal:

Blair v. *Wilson Syndicate Trust*, Cir. 5, 39 F. 2d 43.
Cleveland Trust Co. v. *Commissioner*, Cir. 6, 115 F. 2d 481.
Commissioner v. *Morriss Realty Co. Trust*, Cir. 7, 68 F. 2d 648.
Nee v. *Main Street Bank*, Cir. 8, 174 F. 2d 425.
Pennsylvania Co. for Insurances, etc., v. *U. S.*, Cir. 3, 146 F. 2d 392.
United States v. *Davidson*, Cir. 6, 115 F. 2d 799.
Porter v. *Commissioner*, Cir. 9, 130 F. 2d 276, 280.

especially the "business purpose" cases:

Washburn v. *Commissioner*, Cir. 8, 99 F. 2d 478.
United States v. *Rayburn*, Cir. 8, 91 F. 2d 162.
Davidson, Trustee, v. *U. S.*, Cir. 6, 115 F. 2d 799.

Guitar Trust Estate v. *Commissioner*, Cir. 5, 72 F. 2d. 544.

Lewis & Company v. *Commissioner*, 301 U. S. 385.

For example, in *Washburn*, *supra*, the Circuit Court for the Sixth Circuit said:

> "While the form of the trust here presented is doubtless within the comprehensive meaning of the word 'association', as that term has been defined, explained, and developed by the decisions of the Supreme Court, the controlling question is not the similarity in form to corporate organizations, but rather the purpose of the alleged trust,"

and in *Nee*, *supra*, the Circuit Court for the Eighth Circuit said:

> "On the first feature, a trust cannot ordinarily be regarded as having been created for an enterprise purpose, or as having thereafter become converted into an enterprise, if its sole or dominant object and activity are a liquidation of the trust estate or a holding to preserve the trust property,"

and in *Pennsylvania Company*, *supra*, the Circuit Court for the Third Circuit said:

> "What Congress did not intend to embrace within the term 'associations' were pure trusts, that is, trusts of traditional pattern where property is conveyed by will, deed, or declaration to a trustee or is to be retained by the settlor on specified trusts for a certain term for the benefit of named or described persons."

In fact, the Circuit Court for the Tenth Circuit, to which the petition for writ of certiorari herein is prayed for, recognized this rule in *Commissioner* v. *City National Bank & Trust Company*, Cir. 10, 142 F. 2d 771, 772, and 773:

> "The court emphasizes that the trusts that are outside the definition of an association are ordinary

trusts, whether created by will, deed or declaration, and are such trusts in which particular property is conveyed to a trustee or is to be held by the settlor, in a specific trust for the benefit of named or described persons. It is pointed out that in such trusts the beneficiaries do not ordinarily plan a common enterprise or enter into a combination for the conduct of a business enterprise. Pages 356, 357 of 296 U. S., pages 294, 295 of 56 S. Ct., 80 L. Ed. 263. The same distinction between pure trusts and business trusts is made by the Ninth Circuit in *Porter* v. *Commissioner*, 130 F. 2d 276, 280, where the court said:

> "A trust does not engage in business, for purposes of the tax, if its sole or principal object and activities are: (1) preservation of specified property; (2) liquidation of a trust estate; (3) distribution of income derived from another source. * * *"

III.

The Decision of the Court of Appeals Erroneously Conceives and Misapplies the Rule of Morrissey v. Commissioner, supra.

The decision of the Court of Appeals should be reviewed because it erroneously interprets the intent of the Congress of the United States in its enactment making "associations" taxable as corporations (*Section 3797 (a) (3) Internal Revenue Code of 1939*) mistakes and misapplies the principles of the decision of this Court in *Morrissey* v. *Commissioner*, *supra*, and utterly fails to recognize the basic and fundamental limitations of that decision in specifically limiting the scope of the problem it was deciding, in this language:

> "* * * what are called 'business trusts' (where) the object is not to hold and conserve particular property, with incidental powers, as in the traditional type

of trust, but to provide a medium for the conduct of a business and sharing its gains * * *

> Those trusts which have the distinctive feature of being created to enable the participants to carry on a business and divide the gains which accrue from their common undertaking * * *
>
> It was not a liquidating trust: it was still an organization for profit, and the profits were still coming in * * *" (296 U. S. 344, 357, 360, 361),

as distinguished from that of a traditional trust of particular property, its conservation and incident business management and its ultimate liquidation as in this Court's post-Morrissey decision in *Lewis & Company* v. *Commissioner*, 301 U. S. 385.

The dominant purpose of petitioner trust, as clearly stated in the instrument (R. 18, 21, and 22), was that it in any event be completely liquidated and distributed during the period of ten years and that the continuation of the trust was dependent upon and "until such time" as the trustees might make conversion of the corpus for distribution to the beneficial owners, otherwise stated in the instrument:

> "The main purpose of this trust is to provide for an economical and centralized management and operation of the property of this trust, *until the liquidation and distribution of said trust property has been completed as herein contemplated.* * * *" (R. 21).

Contra to the decision of the Court below, in this particular the decision is in conflict with decisions of other Courts of Appeal and probably in conflict with applicable principles of decisions of this Court in that the "business purpose" test does not require liquidation to be the sole objective of the creation of the trust, it includes a total purpose of the

conservation and preservation of particular property, the carrying on of such business as incidental and necessary thereto and the liquidation as soon as orderly processes and good judgment will permit (*Pennsylvania Company for Ins., etc., v. U. S.*, Cir. 3, 146 F. 2d 392; *Nee v. Main Street Bank*, Cir. 8, 174 F. 2d 425; *Washburn v. Commissioner*, Cir. 8, 99 F. 2d 478; *Lewis & Company v. Commissioner*, 301 U. S. 385; *Commissioner v. Morriss Realty Company Trust*, Cir. 7, 68 F. 2d 648; *Cleveland Trust Company v. Commissioner*, Cir. 6, 115 F. 2d 481; *Porter v. Commissioner*, Cir. 9, 130 F. 2d 276.

IV.

The Court of Appeals Has Herein Decided a Federal Question in a Way Probably in Conflict with Applicable Principles of Decisions of This Court.

The decision below decides a federal question in a way probably in conflict with the applicable principles of the decision of this Court in *Morrissey v. Commissioner*, *supra*, in that the Court below failed to heed the admonition of this Court in its decision:

> "These decisions, while helpful, are not to be pressed so far as to make mere formal procedure a controlling test * * * cannot be regarded as decisive." (296 U. S. 344, 358);

and the precedent of the later decision of this Court in *Lewis & Company v. Commissioner*, *supra*, which is somewhat analogous to the case at bar, and in the further fact that the Court below mechanically applied the indicia of resemblance of *Morrissey* as being both exclusive determinants and conclusive.

Thus the decision in *Morrissey* has become a judicial Frankenstein, not because of any error in the principles of law therein announced or applied but because the lower courts, as in the case at bar, have for the some twenty-four years since that decision made strained and distorted attempts and maneuvers either to distinguish, avoid or mechanically apply its doctrine on the basis, in many cases, of entire misconception of the real rule of that case and the scope of the subject to which the rule there announced was intended by this Court to be applied. The case at bar is an example of this for an analysis of the opinion below makes it clear that it is as if the Court below had applied a pair of calipers to the structure of petitioner trust and upon finding four of the five Morrissey dimensions present, proceeded, without consideration of the all important "business purpose" test, to the conclusion that petitioner trust is an "association" under *Section 3797 (a) (3) of the Internal Revenue Code of 1939.*

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 5940 — NOVEMBER TERM, 1958

JOHN I. COOPER, H. W. PRICE, L. W. PRICE, JUNE PRICE DANGLADE, DORIS LEE TAMMANY, CLARA MAY EDWARDS, JOHN M. GREEN, and TRUE W. CHILDS TRUST, H. W. PRICE, Trustee, and L. W. PRICE, Successor Trustee to John I. Cooper, Deceased Trustee,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

R. L. Letton for petitioners.

James P. Turner, Atty., Dept. of Justice, (Charles K. Rice, Asst. Atty. Gen., Dept. of Justice, Lee A. Jackson and Melva M. Graney, Attys. Dept. of Justice, were with him on the brief) for respondent.

Before PHILLIPS, MURRAH and LEWIS, Circuit Judges.

PHILLIPS, Circuit Judge.

This is a petition to review a decision of the Tax Court. The petitioners are the John I. Cooper, H. W. Price and others Trust[1] and H. W. Price and L. W. Price, trustees of such taxpayer trust. Deficiencies for the years 1950 to 1953, inclusive, are involved. The taxpayer trust filed fiduciary income tax returns for estates and trusts for such years. The Commissioner determined deficiencies on the ground that the taxpayer trust was analogous to a corporate organization and therefore taxable as an association under § 3797(a)(3) of the Internal Revenue Code of 1939. The Tax Court sustained the determinations of the Commissioner.

The John M. Cooper Trust,[2] a testamentary trust, was created in 1914 by the will of John M. Cooper, ancestor of the beneficiaries of the taxpayer trust. The testamentary trust included all of the testator's residuary estate and provided for distribution of the corpus at the end of its term of 35 years, in equal shares to the testator's children then living, and the heirs of each of his deceased children. At the end of the 35-year term, on October 19, 1949, the assets of the testamentary trust, consisting of cash, real estate, 315 shares, constituting a controlling interest, of the Baxter State Bank and United States Series G Bonds were distributed. Such assets had an aggregate value of $355,323. The instrument creating the taxpayer trust was executed on October 19, 1949, by the beneficiaries of the testamentary trust and their wives and conveyed to two of the beneficiaries, John I. Cooper and H. W. Price, as trustees, all the assets of the testamentary trust, except the cash and Series G Bonds.

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1. Hereinafter called the taxpayer trust.
2. Hereinafter called the testamentary trust.

The taxpayer trust instrument recited that the property described therein had "an income producing potential" which could "be better protected by a unified control, management and operation * * * until such time as the trustees" of the taxpayer trust "or their successors," in the exercise of the discretionary powers conferred upon them should "sell and convert into cash" the assets of the trust "for distribution among the grantors herein, their heirs or assigns."

The term of the trust was fixed at 10 years. The trust instrument conferred on the trustees broad powers and duties which were enumerated in part as follows:

> "1. Said trustees, or their successors, shall have the full and complete management and control of all of said property, real and personal, with power to lease and rent the same, collect the rents therefrom, and with power in said trustees to sell and dispose of the whole or any part or parts of said trust estate, either together or in parcels and either for cash, or upon terms as to said trustees may seem proper, and with power to lease said real estate or any part thereof for mining purposes or otherwise, for the term or period not to exceed ten years from the date of said lease, whether or not said lease period or term shall or may extend beyond the fixed term of this trust, and collect the rentals or royalties therefrom, to execute and deliver all deeds, leases, contracts and other instruments necessary and proper to carry out the purposes of this trust, and with power to borrow money, pledge or mortgage said property or any part thereof if and when in the discretion of said trustees the same may be necessary to obtain funds to carry out the purposes of this indenture, and the power to invest the funds of said trust in real or personal property only and whenever in the judgment of said trustees said investments shall be necessary and proper to protect and preserve the trust estate or part thereof, or the potential income therefrom. It is the intention of the grantors herein to

invest said trustees with the full and complete discretionary power in the management, control, liquidation and distribution of the trust estate hereby created."

The trustees were required to keep books and records, to make such books and records available to the beneficiaries at all reasonable hours; and to furnish the beneficiaries with an annual balance sheet statement of their operations.

The trust agreement further provided:

> "The main purpose of this trust is to provide for an economical and centralized management and operation of the property of this trust, until the liquidation and distribution of said trust property has been completed as herein contemplated by the trustees for the benefit of the beneficiaries; the holding together all of said property, and the various parts thereof, so that the maximum return may be received therefrom either from rentals or royalties, or from the sale of all or any part thereof, during the term hereof as, in the discretion of said trustees, shall be for the best interests of the beneficiaries; to vest in the trustees full power and authority in all things to carry out the purposes and intention hereof as said trustees in their discretion may find and determine to be for the best interest of the trust and beneficiaries thereunder, retaining in the grantors, their heirs and assigns the right to have and receive their proportionate share of the distribution of income or corpus as and when made by the trustees, and in the event liquidation and distribution has not been made of all of the corpus of said trust estate at the end of said ten year period, to have and receive from said trustees upon the expiration of the fixed term hereof, their proportionate part and share of such remaining assets and property of the trust, either in kind or in cash."

The trust agreement required quarterly distributions of $2,000, to be apportioned among the beneficiaries and

further provided that such distributions should be increased "if in the judgment of the trustees, income from said trust operations, proceeds from the sale or encumbrance of part or parts of the corpus of said trust, are available for distribution and in the discretionary judgment of the trustees, such additional funds can be distributed without impairing the continued normal and economical administration of the trust."

The trust instrument empowered the trustees to make distribution in kind of any part or parcel of the trust estate.

The trust agreement further provided that in the event of death of any beneficiary all the beneficial share of such deceased beneficiary should be paid to his heirs, executors, administrators, devisees or trustees.

It further provided that the interests of the beneficiaries should be transferable, but that before a transfer should be made the remaining beneficiaries should first be given the option and should have the right to acquire such beneficial interest for a period of 30 days.

Provision was made for successive trustees in the event of the death or resignation of a trustee.

John I. Cooper, one of the original trustees, died in 1951 and was succeeded by L. W. Price. Certain of the original beneficiaries have died since the creation of the taxpayer trust and have been succeeded by their heirs or assigns.

The real estate transferred to the taxpayer trust consisted primarily of farm lands. One 80-acre tract was strictly mining land and a 600-acre tract also contained some mineral deposits. Both of such tracts were under mineral leases from the testamentary trust on October 19, 1949. At the expiration of these leases the trustees of

the taxpayer trust executed new leases on each tract. One lease was for a period of 10 years from January 16, 1953, and extended the lease well beyond the original terms of the trust.

Since October 19, 1949, the trustees of the taxpayer trust have rented the farm lands conveyed to such trust on a share-crop basis, receiving one-third of the crop grown as rental.

On October 29, 1951, the taxpayer trust sold approximately 336 acres of its realty for a total consideration of $23,448.45, realizing a gain from such sale of $4,686.40. The taxpayer trust sold another tract in March, 1952, with a resulting loss of $4,600.

The 315 shares of stock of the Baxter State Bank represented a controlling interest in the bank. Several small sales for the purpose of qualifying certain persons as directors or officers of the bank were made between January 10, 1950, and January 3, 1952. Other sales were made to "valued customers." Such sales were not sufficient to deprive the taxpayer trust of a controlling interest in the bank. The taxpayer trust realized approximately $9,000 gain from such sales of stock.

The value of the trust assets, the yearly net gains, the amounts distributed to beneficiaries and cash on hand at the close of each taxable year were as follows:

	Asset Value per books as of December 31	Net Gain	Distributions to beneficiaries	Cash on hand at end of taxable year
1949	$161,160.99			
1950	159,813.01	$55,652.02	$57,000	$ 3,999.48
1951	179,318.71	91,505.70	72,000	43,324.39
1952	203,140.69	71,821.98	48,000	75,892.97
1953	203,002.28	47,861.59	48,000	68,599.02

The tax court found that the taxpayer trust was created for the purpose of carrying on a business enterprise and was, during each of the years in question, an association, taxable as a corporation.

Section 3797(a)(3) of the Internal Revenue Code of 1939 defines the term "corporation" as including associations and the applicable Treasury Regulations[3] declare that the term "association" includes "* * * any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. * * *"

This court, in *Hamilton Depositors Corporation* v. *Nicholas*, 10 Cir., 111 F.2d 385, 387, said that the attributes of such an association, under the decision of the Supreme Court in *Morrissey* v. *Commissioner*, 296 U. S. 344, were:

"1. A continuing entity throughout the trust period;

"2. Centralized management;

"3. Continuity of the trust, uninterrupted by death among the beneficial owners;

"4. Means for transfer of beneficial interests;

---

3. Regulations 111, §29.3797-1, §29.3797-2, and §29.3797-3, are applicable to the taxable years 1950 and 1951. Regulations 118, §39.3797-1, §39.3797-2, and §39.3797-3, apply to the taxable years 1952 and 1953, but are in substantial conformity to the earlier ones.

"5. Limitation of personal liability of participants to property embarked in the undertaking."

In *Morrissey* v. *Commissioner*, 296 U. S. 344, 357, the court said:

"4. The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity. The resemblance points to features distinguishing associations from partnerships as well as from ordinary trusts."

The absence of a single indicium, such as failure to limit personal liability of participants to property embarked in the undertaking, does not prevent a trust from being taxed as an association, if other indicia bring it within the terms of the statute and regulations.

Here, each of the first four of the enumerated indicia of an association, set forth by this court in *Hamilton Depositors Corporation* v. *Nicholas*, *supra*, were present. The taxpayer trust is a continuing entity, since the instrument grants power to a surviving trustee to appoint a successor from among the beneficiaries, with the approval of a majority in interest, and failing that it provides for the appointment of a successor trustee by the probate court. The express purpose of the trust was to secure unified control, management and operation of the taxpayer trust properties by the trustees. Among the broad powers of centralized management were "full power and authority in all things to carry out the purposes and intention hereof as said trustees in their discretion, may find and determine to be for the best interest of the trust and beneficiaries there-

4. See also: *Commissioner* v. *City Nat. Bank & T. Co.*, 10 Cir., 142 F. 2d 771 and *United States* v. *Hill*, 10 Cir., 142 F. 2d 622.

5. *Fletcher* v. *Clark*, 10 Cir., 150 F. 2d 239, 241.

under," and "full and complete management and control of all of said property, real and personal, * * *." The continuity of the taxpayer trust was not to be interrupted by the death of any of the beneficial owners. Some beneficiaries died during the life of the taxpayer trust, without in anywise impairing its operation. The trust agreement provided for a means to transfer beneficial interests with the provision that a beneficiary desiring to transfer his interest should first give the other beneficiaries an opportunity to purchase his share.

Neither under the provisions of the trust instrument, nor as the taxpayer trust was actually operated by the trustees, was orderly liquidation, rather than business activity the primary purpose of the trust. Complete distribution of net earnings was not required and was not, in fact, made in two of the years in question. Undistributed cash in the hands of the trustees at the end of the taxable year 1950 was $3,999.48 and at the end of the taxable year 1953, was $68,599.02. The only liquidation of corpus effected during the taxable years in question was the sale of a few shares of bank stock and a portion of the farm lands. Clearly, the purpose of the taxpayer trust was the operation of the property conveyed to it through centralized management for the purpose of maintaining control of the Baxter State Bank and the realization of gain and profit through the carrying on of business activities. Nothing in the trust agreement or in the acts of the trustees indicated a planned or compulsory liquidation. As a matter of fact, liquidation was not required, attempted, or achieved. Large profits were made through business activities. Earnings were received from crop rentals, mineral royalties and dividends.

Important factual differences clearly distinguish the instant case from the family trust cases, such as *Commis-*

sioner v. *Guitar Trust Estate*, 5 Cir., 72 F. 2d 544; *Paine* v. *United States*, D. C. Mass., 32 F. Supp. 672; and *Williams* v. *Commissioner*, decided June 19, 1944 (1944 P-H-T-C Memorandum Decisions, Par. 44,216).

Moreover, family trusts, if they have the requisite characteristics, may be classed and taxed as associations.[6]

Accordingly, we conclude that the trust was taxable as an association.

Affirmed.

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6. *National Metropolitan Bank* v. *Commissioner*, 4 Cir., 145 F. 2d 649; *Commissioner* v. *Vandegrift R. & Inv. Co.*, 9 Cir., 82 F. 2d 387; *Titus* v. *United States*, 10 Cir., 150 F. 2d 508.

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No. 682

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN I. COOPER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 46–56) are not officially reported. The opinion of the Court of Appeals (Pet. A1–A10) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1958. The petition for rehearing was denied on December 29, 1958. The petition for a writ of certiorari was filed on February 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the taxpayer trust was an association taxable as a corporation under Section 3797(a)(3) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 3797(a) of the Internal Revenue Code of 1939 and Sections 29.3797–1, 29.3797–2 and 29.3797–3 of Treasury Regulations 111 are printed in the Appendix, *infra*, pp. 8–12.

STATEMENT

The facts, found by the Tax Court (R. 47–52), and stated by the Court of Appeals (Pet. A1–A7), are in large part undisputed and may be summarized as follows:

The taxpayer trust filed fiduciary income tax returns for the years 1950 to 1953 inclusive. The Commissioner determined deficiencies for each of these years on the ground that the taxpayer trust was an association taxable as a corporation under Section 3797(a)(3) of the Internal Revenue Code of 1939. (Pet. A2.)

In 1914, the will of John M. Cooper created a testamentary trust of the entire residue of the testator's estate. This trust was to last for a term of 35 years with distribution at the end of that period in equal shares to the testator's children then living and to the heirs of his deceased children. On October 19, 1949, the assets of this trust having an aggregate value of $355,323 were distributed. They consisted of cash, real estate, a controlling interest of 315 shares

of the Baxter State Bank, and United States Series G Bonds. Also on October 19, 1949, the instrument creating the taxpayer trust was executed by the beneficiaries of the testamentary trust and their wives. This instrument conveyed to two of the beneficiaries, John I. Cooper and H. W. Price, as trustees, all the assets of the testamentary trust, except the cash and Series G bonds. (Pet. A2.)

The instrument creating the taxpayer trust recited that the property described therein had "an income producing potential" which could "be better protected by a unified control, management and operation * * * until such time as the trustees * * * or their successors" should "sell and convert into cash" the assets of the trust or any part thereof "for distribution among the grantors." (Pet. A3; R. 18.)

The term of the trust was fixed at ten years. Broad powers and duties were conferred on the trustees including, *inter alia*, full control of the trust property with discretionary power to sell, lease, mortgage or pledge any or all of the assets, and the power to borrow money and to invest the trust funds. The stated purposes of the trust included the "economical and centralized management and operation of the property" until liquidation and distribution, and "the holding together" of the property so that the "maximum return" from rentals, royalties and sales could be achieved. In the event the trust assets had not been distributed at the end of the term, the trustees were authorized to make distribution in cash or in kind. Quarterly distributions of $2,000 were required in the instrument, but such distributions

could be increased in the discretion of the trustees if "such additional funds can be distributed without impairing the continued normal and economical administration of the trust." Continuity of the trust was insured since the interests of the beneficiaries were transferable; the heirs or devisees of a deceased beneficiary succeeded to his interest; and, provision was made for successor trustees upon the death or resignation of a trustee. In fact, one of the trustees died in 1951 and was succeeded by L. W. Price, and certain beneficiaries have died and have been succeeded by their heirs or assigns. (Pet. A3–A5).

The trust real estate consisted primarily of farm lands which were rented on a share-crop basis. Two sales of real estate during 1951 and 1952 resulted in a gain of $4,686.40 and a loss of $4,600, respectively. The real property also included two tracts under mineral lease. At their expiration, the trustees executed new leases on each tract. One lease was for a period of ten years from 1953 and thus extended well beyond the terminal date of the trust. (Pet. A5–A6)

The 315 shares of stock in the Baxter State Bank represented a controlling interest in the bank. Several sales of stock were made to valued customers and employees, but control of the bank was retained by the trust. (Pet. A6,)

Large profits were made by the trust through these business activities. Earnings were received from share-crop rentals, mineral royalties, and dividends. Substantial amounts of cash were on hand at the end of each of the taxable years. (Pet. A6, A9)

Based on the foregoing, the Tax Court (R. 52) and the Court of Appeals (Pet. A10) both concluded that the taxpayer trust was formed for the purpose of carrying on a business enterprise and was, for each of the years in question, an association, taxable as a corporation.

ARGUMENT

The decision below correctly applies well settled rules of law to basically undisputed facts. This Court has considered the problems of treating trusts as associations under the taxing statutes in a number of cases and the applicable legal principles are now well established. *Morrissey* v. *Commissioner,* 296 U.S. 344; *Swanson* v. *Commissioner,* 296 U.S. 362; *Helvering* v. *Combs,* 296 U.S. 365; *Helvering* v. *Coleman-Gilbert,* 296 U.S. 369; and, *Lewis & Co.* v. *Commissioner,* 301 U.S. 385.

Section 3797(a)(3) of the Internal Revenue Code of 1939, Appendix, *infra,* p. 8, defines the term "corporation," when used in the Code, as including "associations." It is settled by the decisions that trusts which are engaged in carrying on a business for profit and which have the essential characteristics of an association will be taxed as a corporation under this provision. Conversely, where the trust is an ordinary trust "created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it * * *", it will not be taxed as an association. Regulations 111, Section 29.3797-3, Appendix, *infra,* pp. 9-12; see also *Lewis & Co.* v. *Commissioner; supra.*

Whether a particular trust falls within the category of an association, as that term has been defined, is a question of fact in each case, inappropriate for review here. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51.

The opinions below clearly indicate that the Tax Court and the Court of Appeals correctly understood and applied the above rules. Moreover, there is abundant factual support for the conclusion that the taxpayer trust had the requisite form and purpose for classification as an association. That the primary purpose of the trust was the conduct of business and not the liquidation of family assets is shown by the recitations in the trust instrument itself quoted above; the broad, business-like powers granted the trustees; the fact that liquidation was neither required nor attempted; and the further fact that all the activities of the trustees reflect a profit producing, not a liquidating, motive. (Pet. A9.) There is also the necessary resemblance to corporate form since the instrument provides for a centralized management and a continuing entity, continuity regardless of death among beneficiaries, and a means for transfer of the beneficial interests. (Pet. A8–A9.)

The cases cited as being in conflict with the opinion below (Pet. 9–10) are distinguishable on their facts. For example, in some the requisite business activity was absent. *Blair* v. *Wilson Syndicate Trust*, 39 F. 2d 43, 46 (C.A. 5th); *Cleveland Trust Co.* v. *Commissioner*, 115 F. 2d 481, 484 (C.A. 6th); *Pennsylvania Co., Etc.* v. *United States*, 146 F. 2d 392, 396 (C.A. 3d); *Helvering* v. *Washburn*, 99 F. 2d 478, 481 (C.A. 8th). In

others, there was no resemblance to an association. *United States* v. *Davidson*, 115 F. 2d 799, 801 (C.A. 6th); *Lewis & Co.* v. *Commissioner*, *supra*. And, in some all of the attendant circumstances indicated that an ordinary liquidating or family trust was involved. *Blair* v. *Wilson Syndicate Trust*, *supra*; *Commissioner* v. *Morriss R. Co. Trust No. 2*, 68 F. 2d 648, 651 (C.A. 7th); *Commissioner* v. *Guitar Trust Estate*, 72 F. 2d 544 (C.A. 5th).

Indeed, some of the cases cited as conflicting with the opinion below held that the trusts involved were taxable as associations because the requisite form and activity were present. *Nee* v. *Main Street Bank*, 174 F. 2d 425 (C.A. 8th); *Porter* v. *Commissioner*, 130 F. 2d 276 (C.A. 9th); *United States* v. *Rayburn*, 91 F. 2d 162 (C.A. 8th).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * * *

(3) *Corporation.*—The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 3797.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939: [1]

SEC. 29.3797–1. *Classification of Taxables.*—For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection. Thus, a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. (See section 29.3797–3.) * * * The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships. (See sections 29.3797–2 and 29.3797–4.) The definitions, terms, and classifications, as set forth in

[1] The substantially similar provisions of Regulations 118, Secs. 39.3797–1, 39.3797–2 and 39.3797–3, apply to the taxable years 1952 and 1953 and are not reproduced herein.

section 3797, shall have the same respective meaning and scope in these regulations.

SEC. 29.3797-2 [as amended by T.D. 5468, 1945 Cum. Bull. 332]. *Association.*—The term "association" is not used in the Internal Revenue Code in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an inter-insurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Code, a trust or an estate, or a partnership. An "investment" trust of the type commonly known as a management trust is an association, and a trust of the type commonly known as a fixed investment trust is an association if there is power under the trust agreement to vary the investment of the certificate holders. (See *Commissioner* v. *North American Bond Trust,* 122 Fed. (2d) 545, certiorari denied, 314 U.S. 701.) If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.

SEC. 29.3797-3. *Association Distinguished from Trust.*—The term "trust", as used in the Internal Revenue Code, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the

trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph there is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages. The nature and purpose of a cooperative undertaking will differentiate it from an ordinary trust. The purpose will not be considered narrower than that which is formally set forth in the instrument under which the activities of the trust are conducted.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each

other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Internal Revenue Code as a corporation. However, the fact that the capital or property of the trust is not supplied by the beneficiaries is not sufficient reason in itself for classifying the arrangement as an ordinary trust rather than as an association.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer," the use of a "seal," the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws," the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are

attained, in the case of a trust, by the use of the trust form *itself*. The Internal Revenue Code disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.